Supreme Court, U. S.
FILED
FEB 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1209

JOHN A. RICHARDSON and RALPH S. BOWMAN,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JOSEPH BRILL
Attorney for Petitioners
122 East 42nd Street
New York, N. Y. 10017
(212) 697-1213

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners John A. Richardson and Ralph S. Bowman respectfully pray that a writ of certiorari issue to review a determination of the United States Court of Appeals for the Ninth Circuit, rendered on October 26, 1978, with rehearing denied on January 4, 1979, affirming a judgment of the United States District Court for the Southern District of California, convicting petitioners of conspiracy to smuggle laetrile (18 U. S. Code Secs. 371 and 545).

Opinion Below.

The opinion of the Court of Appeals herein is not yet reported. A copy thereof is hereto appended.

Jurisdiction.

The judgment sought to be reviewed was dated and entered October 26, 1978, and rehearing denied January 4, 1979.

The jurisdiction of this Court is invoked under 28 U. S. Code Sec. 1254.

Questions Presented for Review.

1. Should the indictment against these petitioners not have been dismissed in view of the wholly insufficient evidence to establish their guilt?

2. Were the petitioners not in effect deprived of their right to testify by the Trial Court's preliminary ruling that such testimony would open the door to inquiry regarding their tax returns?

3. Did not the entire prosecution of petitioners and others constitute an unjustifiable attack upon the use of laetrile?

4. Did the Trial Court not make a number of erroneous rulings whose cumulative effect was to deprive petitioners of a fair trial?

5. Was the holding of the Court of Appeals herein at variance with the Tenth Circuit decision in *Rutherford* v. *United States*, 582 F.2d 1234?

6. Does not this Court's grant of certiorari in *Rutherford* (on January 22, 1979) fairly require consideration of the instant case in view of the parallel questions involved?

Statutes Involved.

The statutes under which petitioners were convicted are as follows: 18 U. S. Code, Secs.:

> §371. Conspiracy to commit offense or to defraud United States
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.
>
> §545. Smuggling goods into the United States
>
> Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged or fraudulent invoice, or other document or paper; or
>
> Whoever fraudulently or knowingly imports or brings into the United States, any merchandise

contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

June 25, 1948, c. 645, 62 Stat. 716; Aug. 24, 1954, c. 1213, Title V, §507, 68 Stat. 1141; June 30, 1955, c. 258, §2(c), 69 Stat. 242.

Statement of the Case.

The trial ran for almost eight months (from September, 1976, to May, 1977), and the transcript fills more than 7,000 pages. However, we shall attempt to summarize the evidence and proceedings concisely.

Peter Pinard, the first witness (p. 378, Jan. 19, 1977, transcript), was a food and drug specialist of the California Health Department. He told of obtaining laetrile, documents and correspondence under a search warrant

on April 5, 1973. In the course of his testimony the Court ruled that the efficacy of laetrile was not an issue (388-389). The witness made nc reference to these appellants.

David Case, a customs patrol officer in Calexico, Cal. (a small border town) testified that on August 27, 1973, he intercepted a Ford in which one Medina and one Aguilar were traveling and took out ten boxes containing a total of 1800 vials of laetrile, manufactured by Cyto Pharma de Mexico (454). In Medina's pocket was a slip with the name and post office address of Wynn Westover (468).

Jean Antonio Treto, a customs patrol officer in Nogales, Ariz., stated that on September 25, 1973, he stopped a woman crossing the border, identifying her as Gloria Solis de Garrido (489). She was carrying concealed on her person 9571 laetrile pills (496), which came from Cyto (506). The witness made no reference to any of the defendants on trial.

Louis Richenberger, a special agent of the Drug Enforcement Administration of the United States Department of Justice, referring again to the September 25, 1973 incident, was at the port of entry and took certain documents from Ms. Garrido and arrested her for smuggling (519) in the belief that laetrile was prohibited entry by the Food and Drug Administration (524-525). However, it developed that prohibition was dated more than a year later, namely, October 7, 1974 (527). On October 17, 1973, he encountered Gendrop-Gonzales and Symonds-Gonxalez (560). The latter had Bradford's telephone number (569), and he also found a piece of paper bearing Salaman's name, address and telephone number (581). Nothing in his testimony related to appellants Richardson or Bowman (586).

Gary Vermilyea, a customs inspector at the San Ysidro port of entry, on October 17, 1973, met the two Gonzalezes (529). There was nothing in the trunk of the car, but under the back seat he found three boxes with 270 vials of laetrile (533-537) manufactured by Cyto Pharma de Mexico, S. A.

James Kitchens, a special agent of United States Customs, testified that on December 28, 1973, in response to a police call he went to the San Ysidro Motel, where he saw Officer McCann, Raul Guillent and Espiranza Garcia, and some styrofoam cartons containing 1004 vials of amygdalin (617-618). Guillent was arrested—but not the woman—and charged with smuggling (625). He knew of no law barring laetrile or preventing one from bringing it across the border (628, 635). None of the defendants on trial were involved in his particular operation.

Raul Guillent, the next witness, told that he knew the Rio brothers, who maintained the Cyto Pharma laboratory in Mision del Sol, Mexico (637-639). He had arranged to take laetrile to the United States under an agreement whereby he would receive twenty-five cents for each vial. The vials had been placed in his car trunk the day before he was caught (641-643). He was given a year's probation (647). He had met Humberto Medina and Luis Gendrop, the accountant for Cyto (648-649). He knew of no law prohibiting the importation of amygdalin (655). It may be noted that the prosecution miscalculated and exaggerated the earnings of the witness (659).

Edwin D. Sutshall, a customs inspector, told of an incident of April 11, 1975, when Fernando Z. Bonilla entered an inspection lane in a Pontiac (665). Under the back seat the witness found boxes and containers containing laetrile pills, some 2,000 in all (669-671). He knew of no law proscribing laetrile.

Robert W. Davis, a supervisor and customs patrol officer, gave testimony substantially similar to that of the previous witness (686-695). He mentioned that the prohibition of laetrile was by customs regulation (703).

Davis' testimony was interrupted to place on the stand George Griffin, a supervisor for American Airlines (706), who identified a waybill of December 18, 1974, showing a shipment by Ferrando Zamora (from San Diego) to Frank Spolnik (Hammond, Ind.) via Chicago (711). It was a package weighing nineteen pounds, marked "Christmas decorations" but actually consisting of small bottles containing a brownish liquid (712). He was aware of no F. A. A. regulations as to air freight shipments (717), and did not know how the Customs came into the picture (720). No part of his discussion had any reference to the defendants on trial.

Davis, recalled, told of having received a call from a tipster in the Pomona area on December 18, 1974, resulting in the finding of the amygdalin (722-725). He knew the name of the tipster, but refused to disclose it, saying he was not at liberty to do so (727-736); this episode resulted in a mistrial motion, which was denied. Then came the tape of a phone call from Emma McClure on March 14, 1975, to Rudy Alvarez, the supplier of laetrile who was cooperating with Customs agents (755), as well as the tapes of two subsequent conversations of March 17, 1975 (755-787), mentioning amounts, prices and times and places of payment. Objection to the introduction of the conversations was denied (801-802). A request for the identity of the informer was likewise denied (810-811).

Leon H. Lorentzen, a special agent of the Treasury Department Customs Service, testified that on March 18,

1975, he was cooperating with Emma M. McClure, and was in the San Diego airport in surveillance of anticipated purchases of amygdalin by her (816-819). The sum of $962.50 therefor had been suppleid by Customs. She met a young Latin female and obtained a package from a locker containing fifty vials of amygdalin and four bottles. Mrs. McClure gave the package to agent Davis (820). It was labeled as having been made in Mexico by Cyto Pharma (823). The witness made it clear that the transaction had nothing to do with the present defendants (830-831). At this point there was placed in evidence Import Alert #68, declaring laetrile offered for entry into the United States as being a chemical or vitamin (833). At this point there was an extended discussion as to whether the F. D. A. complied with the statute requiring an administrative hearing before determination, the defendants contending that no law prohibited the importation of laetrile (848-851). The Court ruled this to be immaterial in a case where the charge was smuggling (852-853).

Seth Nadel, a special agent of Customs (865-867) told of being in charge at San Diego on March 18, 1975, when he saw Mrs. McClure leaving the rest room with another woman, who went to a locker and then took a cab to the Greyhound Bus station.

The witness Davis, again recalled, told of Mrs. McClure's call to Alvarez in Mexico on March 20, 1975 (850). A series of tapes was objected to by the defendants as not having anything to do with any of them (871). He testified at considerable length concerning such matters as meeting at the San Diego airport (878-879); at the Travel Lodge (880); telephone calls by Mrs. McClure to Alvarez (883); an appointment at American Airlines, where the witness went with Agents Lorentzen, Nadel,

Sundstrom and Kratza, who installed a recording device in Mrs. McClure's vehicle (890-891); a meeting with Bonilla, who was later arrested for smuggling laetrile (895); photographs taken of the McClure-Alvarez meeting (896-897); tape of conversation between them (908); he told her that defendant Richardson dealt directly with Cyto (915-916); quotation of prices (921-922); discussion of hydrogen sulphate and other drugs (923-930); George, an engineer and chemist being a go-between for defendant Richardson and one Spolnik (932); her offer of a friend with a boat for crossing (933-934). Defendant Richardson expressly objected to the tapes as being hearsay and prejudicial (955). There had been no court order for electronic surveillance (978). She had agreed to cooperate with the Government because of charges of perjury before the grand jury pending against her (986). Davis instructed her to inquire about Spolnik but not about Richardson (991); he was trying to identify Bonilla (992). He arrested Mrs. McClure on January 22, 1975 (1011); she was charged with conspiracy to smuggle and with smuggling (1013). He was a member of a group called Laetrile Task Force (1020). He never heard Alvarez say that he did any business with any of the defendants on trial (1029). Nor did Mrs. McClure (1029-1030). The Customs service provided money for her to purchase laetrile (1060). He knew of no law forbidding the importation of laetrile (1062). Mrs. McClure told him that defendant Richardson charged an exorbitant amount for laetrile (1063), but he did not know that to be true (1064).

Robert D. Clark, a Customs inspector since 1972, was on May 21, 1975, working in the primary inspection lane at San Ysidro, Cal. (1092-1093), when he saw Alvarez driving an Oldsmobile. Alvarez seemed nervous and presented an Alien Registration card (1094). There was nothing in the trunk but under the back seat the witness

found a package wrapped in paper containing various items, including 991 bottles, 6336 amygdalin tablets in plastic containers, proteolytic enzymes, 4100 "wobe-mugos," "ripason, "wobenzym," LEUC and unmarked tablets (1100-1108). The manufacturer was Cyto Pharma de Mexico (1110). He notified duty Customs agents Sundstrom and Kitchens (1113). He was not aware of any duty imposed on amygdalin (1120). He had people declare amygdalin or laetrile, but would not clear them, referring them to the secondary office (1125-1126). He did not know the law, but only the F. D. A. memo (1128-1129).

James Kitchens, recalled, told of contacting Alvarez at the port of entry on May 21, 1975 and taking his business card (1133-1135). Alvarez said he was not paid but was doing what he did gratuitously (1140).

Edwin D. Sutshall, recalled, testified that on November 7, 1975, at an inspection booth he saw Alvaro Gonzalez-Pacheco with a woman and three young children in a car, but did not search the car (1143-1147).

Ronald E. Edelstein, a Customs inspector, was also present on the occasion last mentioned by Sutshall. Pacheco appeared nervous (1156-1158). The witness found three large plastic garbage cans in the rear deck of the station wagon and cardboard boxes with 100 glass vials in each of them, making a total of 2,100 bottles and 1,000 pills; also six containers of white cream or salve, from Cyto Pharma de Mexico, labeled amygdalin (1159-1166). He notified his supervisor, who called for Customs agents (1167). He knew of no law regarding amygdalin, and had heard of shipments thereof which were brought in legally (1171-72). He had no personal knowledge of the involvement of any of the defendants (1169).

Leon H. Lorentzen, recalled, told of searching Pacheco on November 7, 1975, and finding several documents and business cards (1176-1182).

James R. Shaules, a Customs inspector, on January 15, 1976, encountered one Oscar Mejia-Mejia riding up from Mexico in a Volkswagen bus (1184). Mejia-Mejia said he was buying doughnuts and a magazine. The witness searched the car and found three large covered shopping bags containing 1,680 vials with a name similar to "amigdalina," with the manufacturer's name Cyto Pharma (1185-1193). The incident had nothing to do with any of the defendants now on trial (1193-1194).

Lawrence A. Ladage, Senior Special Agent, Office of Investigations, United States Customs, at San Francisco, testified that on September 27, 1973, he spoke to an agent after information from supervisor regarding the smuggling of laetrile (1199). The last part of his answer was stricken by the Court. He requested agent Flinders to watch for a suitcase (1200), and then spoke to Bradford, who protested the seizure of a suitcase containing laetrile (1202-1203). He counted six trays containing ninety vials (1206-1207). Symonds, the custodian of the amygdalin, which he was picking up, was not detained, and voluntarily turned it over to the witness (1217-1230). He said further that laetrile could now be legally imported into the United States upon proper application to the court (1250-1251).

Roland G. Flinders, a special agent of Customs, employed by the Drug Enforcement Administration, Department of Justice, went to the San Francisco International Airport on September 27, 1973, upon receiving a call, and saw Symonds-Gonzalez pick it up on its arrival (1260-1263). The witness gave him the Miranda warning and

then opened the suitcase, which contained 540 vials, giving Symonds a receipt therefor (1264-1271). The total cost of the merchandise was $6,730. He got a call from defendant Bradford. There were yellow pills and white pills including laetrile among others (1273-1304). The United States Attorney reiterated that the case was not concerned with the merits of laetrile (1312-1313). The witness could not recall whether Bradford mentioned Symonds' name (1319). Reliance was on 18 U. S. Code 545, 19, 1305, prohibiting certain imports (1319), but there was no mention of amygdalin or laetrile (1320).

Patricia Schoenfeld, a representative and record custodian of Pacific Telephone Company, identified two of Bradford's bills, showing calls to Tijuana, Mexico in September and October, 1973 (1330-1352). She had never heard of defendant Richardson (1360).

Alex Geczy, testified that in August, 1971, he was employed by Cyto in Tijuana, and he gave a non-responsive answer about helping in the manufacture of laetrile, which answer, nevertheless, was not stricken (1362-1363). He had discussions with Gustavo del Rio, George del Rio, McNaughton and Contreras concerning the excess production of laetrile for the United States in September or October, 1971. Even though no defendant was involved, a motion to strike his answer was denied (1362-1366). There was a decision to smuggle into the United States (1371). One Castillo smuggled to distributors, Thurston, Howard and Mattingly and was arrested (1374-1376). One Rogelio Casti was also arrested (1374). A hearsay conversation with McNaughton was received (1380). He had no dealings in laetrile since December, 1972 (1388). Laetrile was being used for research purposes at Sloan Kettering (1391-1394). The witness was an unindicted coconspirator and had been given a grant of immunity

(1405, 1402). While he had legally imported amygdalin, he had never sold any to Bradford, Salaman, Richardson or Bowman—the defendants on trial (1407-1408, 1412). Naming it "apricot kernel extract" made it legally importable (1413-1414). Sloan Kettering was still doing research in this field (1416).

Gene L. White, a special agent of Customs on August 19, 1975, testified regarding a call that day by Mrs. McClure to Cyto Pharma ordering a quantity of B-17 (1449-1459). A money order for the shipment was exchanged for a cashier's check to the order of Cyto Pharma (1462), and a package was received containing 255 500-gram laetrile (or B-17) and 400 wobe-mugos (1467). The whole plan was conceived and executed by the authorities —a manifest case of entrapment (1470). The witness was a member of the laetrile task force (1492).

Marion R. Lotz, a postal inspector, was assigned to assist in laetrile smuggling in the Greater San Diego area, and obtained a parcel containing pills from Lecompte, La. (1497-1502).

William C. Burgess, a postal inspector, Donald Charles Goodding, another postal employee and Edward E. Schneider, a bank manager, produced certain documents (checks and statement) for Mrs. Moran (1512-1553) under subpoena.

Emma McClure testified that she was employed in a boarding house for cancer patients, who would be supplied with laetrile (1560-1563). The laetrile would be purchased from Cyto and mailed to the patients. It was bought by Mrs. Luther, who maintained the house, and by the witness (1564). The two of them smuggled in cars, purses, trunks and glove compartments (1565). Mrs.

Luther would pay the witness $250 weekly for her services (1568). She identified Mrs. Luther's checks (1570-1571). Merchandise was also smuggled to them by Alvarez (1572). Lidia Ramirez, a nurse employed by Dr. Hernandez, told the witness that she (Lidia Ramirez) was delivering laetrile to Dr. Richardson in June, July and August, 1973 (1577-1578). The latter testimony was objected to as hearsay under Rule 804 of the Federal Rules of Evidence, but the Court admitted it as the statment of an unindicted coconspirator (1582). The witness was indicted but was promised that upon cooperating the charges would be dismissed (1585-1587). Thereupon ensued a process of entrapment to purchase more laetrile and smuggle it across the border between April, 1973 and February, 1975 (1592-1600). Agents gave her money to pay for merchandise (1623). One set of drivers would go to Dr. Contreras' clinic and a second to the clinic of Dr. Hernandez (1694). She crossed medicine for Mildred Palmer and other cancer patients (1706-1707). She agreed to work for the prosecution and told the Assistant United States Attorney where laetrile, books and records were kept (1713, 1718).

The Government called as a witness Angela Gillmer, office nurse for Dr. Richardson since March 1, 1973 (1744-1746). She testified that he used laetrile in his practice, describing the color and appearance of the tablets (1746-1747). She did not know how they were supplied to him (1748). Defendant Bowman was employed by Dr. Richardson (1748) as administrator. Mr. Bowman's son and daughter and Dr. Richardson's daughter also worked in the office (1749-1752). Some of the vials were labeled Cyto, others Sidus (1748). Other firms manufactured and distributed laetrile in the United States (1755). She described Dr. Richardson's practice as a "wholistic metabolic therapy" (1758), with laetrile having the significance

of one modality—meaning, in medical parlance, the application of a physical therapeutic agent (1758-1759). He used various drugs made by American companies, including Armour, Lilly and Merck (1764-1765). Laetrile, amygdalin and vitamin B-17 were slightly different but were referred to interchangeably (1771), and they are available in the United States (1776). She had been acquitted of practicing medicine without a license (1777-1778). The purpose of a certain deposition in her case was to "get" Dr. Richardson (1779), who had been using laetrile for twelve years (1809). About 2,000 physicians were actively using it in their practice in the United States (1819).

Emma McClure, recalled, stated that agent Davis instructed her to bring Dr. Richardson's name into the conversation with Alvarez (1831). She did not know how amygdalin was transported to Dr. Richardson (1832). Nevertheless, she blurted out that he charged $50 per vial, "outrageous prices" for the drug (1869)—a remark which was theoretically stricken. She had received $1300 to $1400 from Government agents (1908). She had never previously seen or spoken to Dr. Richardson (1912-13), but ventured the hearsay that patients called him "a highway robber"—more strict hearsay (1916, 1919).

George G. Rasor, employed by Avis Rent-A-Car, told of rentals in November and December, 1975, by Antoinette Moran, who worked for Cyto (1937-1941).

Gene L. White, the special agent of United States Customs, recalled, testified of a conversation on December 3, 1975, with Francisco Curiel, who said he had been hired by Alvarez to smuggle laetrile (1956-1957). For the storage of laetrile he rented a house in Imperial Beach, Cal. (1958-1959) and gave instructions to Curiel (1962), who delivered 5,000 laetrile tablets to him (1964), to be mailed

to D. Hanson and D. Schuster in Rochester, Minn. (1966). Curiel met Antoinette Moran on December 17, 1975, and she went with the boxes to Chula Vista, Cal. (1971-1981). At this point the prosecutor said the basic issue was whether the defendants knew the laetrile was smuggled (2056-2057). The laetrile brought in by Curiel was declared at the border (2086). No charges were brought against any of the six named recipients.

White's testimony was interrupted to introduce that of Elaine Moreno, a bookkeeper for a rental company, who told of Antoinette Marie Moran renting a car from July 21 to July 26, 1975, and using it for a distance of 591 miles (2161-2167).

White resumed the stand and testified that the United States Government had given Curiel permission to bring amygdalin into the United States (2177). None of the packages or shipments concerning which he had testified had anything to do with defendants Richardson or Bowman (2195). Amygdalin (2225) had been listed as safe by the Food and Drug Administration (official number 21:121:101).

Francisco T. Curiel testified that he began working for Alvarez in October, 1975 (2291) with the task of crossing pills into the United States. He was supposed to wrap and mail packages of pills (2303), but he had Rosa Ruiz do the mailing (2314) and others bring the merchandise across (2317). When he was stopped by Customs agents, he offered to cooperate (2325-2326). Upon the suggestion of Alvarez he rented a house at Imperial Beach and informed White (2333). He was to mail 5,000 pills to Mr. Hanson, in Minnesota (2334) and 300 more vials to the same person (2337). Alice, also known as Maria, picked up 2,600 more vials (2340-2342). He engaged in food

smuggling, hiring others to asist him (2467-2473). He never knew or heard of defendants Dr. Richardson or Bowman (2472).

Harvey J. Andrews, special agent of Customs, on December 20, 1975, saw Bradford, Torres and Mrs. Moran transferring a stack of white boxes from one car to another, but was not there when Davis inventoried the boxes (2526-2548).

Charles Brisbin, special agent of customs, on December 20, 1971, saw Mrs. Moran and Bradford in the Cadillac and arrested him (2565A-2565B). The witness took a number of boxes and vials with liquid, and found a list of names, dates and amounts (2567-2587). He also discovered a Browning pistol under a seat in the automobile (2593). His surviellance had no connection whatsoever with defendants Richardson or Bowman (2613).

Steven C. Davis, a special agent of Customs, participated in the surveillance (2624-2637).

Gene L. White, recalled, told of letters ordering laetrile under various names (2650-2652), and of finding an envelope marked "Committee for Freedom of Choice in Cancer Therapy," containing $10,000 (2656); a check to Alvarez for $4500 (2662) and 3900 vials of laetrile in the car (2672). It developed that before the grand jury he had testified the laetrile was declared at the border (2700). He knew of no law forbidding the importation of laetrile or vitamin B-17 (2702).

Keith F. Tiner, an Internal Revenue Service agent since April, 1972, testified of his duty to perform audits on Federal income tax returns (2732). Between April and August, 1974, he had audited Dr. Richardson's 1971

and 1972 returns (2735). He was aware that Dr. Richardson had just finished a third trial for using laetrile and that the charges had been dropped (2746). The witness admitted one of his statements was false (2747), and identified this significant addition to his notes (2748): "Make sure there is a case on Doctor."

Robert W. Davis, recalled, told of a March 15, 1975, meeting between Mrs. McClure and Mrs. Zelmer, to whom Mrs. McClure paid over the money given by the witness (2804), Mrs. Zelmer delivering fifty vials and fifty tablets of amygdalin (2808).

Lidia Ramriez had worked in 1972 for the Santa Ana Neurology Clinic as a practical nurse (2831) and then in Tijuana at the Clinica de Tumorez (2832). She knew Cyto people, including Del Rio, Gendrop and Alvarez (2834), as well as Mrs. McClure and Mildred Palmer (2835-2836). She bought small amounts of laetrile from Mrs. McClure (2837-2838). She took Bradford and Salaman to the Cyto Pharma laboratory (2839), and discussed taking laetrile to them in San Jose (2842). She delivered to Bradford across the border (2847). She said that Bradford paid her (2848) and told her to camouflage the laetrile putting it in a suitcase with clothing (2863). The name of Dr. Richardson never came up with regard to the purchase of laetrile (2867). The Clinica de Tumorez employed laetrile in the treatment for cancer (2868-2869). The witness was arrested for smuggling, and her case was pending at the time of this trial (2877).

Elroy W. Elster, a criminal identification specialist of the California Department of Justice, testified that Bradford had no license for a weapon (2892).

Antonio Manuel Monez, a trucking company employee, told of meeting Beverly Newkirk, an unindicted coconspirator, on November 5, 1974 (2900-2903), and receiving five or six packages for Marilyn Michaelis or American Opinion Bookstore and Douglas Heinsohn (2905-2909). Frank Thomas opened one box containing a plastic bottle (2913-2914).

Frank Thomas, an in-flight service supervisor of United Airlines, testified that on the same date he received a call from employee Dick Carmichael (2922) and opened a box containing vials instead of printed matter as marked (2924).

Donald McPherson, a customer service agent of United Airlines at San Jose, received a phone call from Beverly Newkirk, and along with Thomas found the vials (2931). He reported the shipment to the United States Treasury (2937); Bradford protested the opening (2939-2940), and agents from the F. D. A. arrived (2941). The State of California placed an embargo on the five boxes (2942). He did not recognize Dr. Richardson or Bowman as being in any manner involved (2950).

Nils Robert Hallden, another United Airlines supervisor of customer service likewise testified concerning the opening of the packages and the complaint of Bradford (2951-2960).

Frank C. Sanders, a special agent of the Bureau of Alcohol, Tobacco and Firearms, went to the airport with agent Christopherson on November 6, 1974 (2986-2987), seeing the tablets, vials and containers of apparent alcohol (2988). He saw Bradford and said that Bradford told him they were vitamin B-17 used in the veterinarian field (2989-90). Bradford may have also indicated that they were for medical use. The consignees were Heinsohn and Michaelis (3001). Neither Dr. Richardson nor Bowman was involved in the packages (3015). The material was not smuggled (3016).

Robert Christopherson, a special agent of the Treasury Department, on November 6, 1974, saw Hallden open the packages at the San Jose air freight terminal; they were from Cyto Pharma and addressed to Heinsohn and Michaelis (3038). He met Bradford, who said he was president of the Committee for Freedom of Choice (3045). The witness found no alcohol, firearms or tobacco violation (3050).

Lidia Ramirez, recalled, testified that she did not know Dr. Richardson (3119); that her reference to no more delivery to Dr. Richardson was not the truth (3120); and that she never told Mrs. McClure or any one else that she was flying for Dr. Richardson (3136).

Robert G. Chessey, a special agent for Customs in El Paso, Tex., testified that on August 27, 1974, he went to the office of resident agent John Flynn in Nashville, Tenn., and then to Knoxville, where he met Heinsohn through a confidential informant (3162-3165). The witness pretended to want laetrile for the New England area, and Heinsohn agreed, saying he had a source of supply from Cyto Pharma through Del Rio in Tijuana and he supplied samples (3180-3181), which the witness bought (3182). They were being purchased at wholesale prices (3189). Then came a taped conversation between the witness and Heinsohn (3189-3204). In the next conversation (3212-3215) Heinsohn's attitude had changed and he wanted nothing more to do with the importation of anything from Mexico.

At this point of the trial appellant Bowman, in view of the extended tenor of the proof, raised this fundamental question (3285): "Is the simple posession of Cyto Pharma material conclusive evidence of smuggling?"

Robert N. Whitaker, an American Airlines employee, identified a number of waybills originating in San Francisco and consigned to Knoxville, Tenn. (3291-3292). He spoke to Heinsohn, who picked up some of the shipments (3294, 3296).

Ernest H. Barbee, a resident of Gatlingburg, Tenn. said that he knew Heinsohn, who asked permission to use the address of the witness for the receipt of a package (3301-3306).

Rodney D. Stromer, a loan officer of a Phoenix bank, was a friend of Dr. Richardson and had purchased vitamin B-17 from him on several occasions (3312-3314). In February and March, 1975, checks were drawn by Dr. S. M. Weisman to the order of Dr. Richardson (3318).

Houston L. Gatlin, a criminal investigator of the Arizona Department of Public Safety, on May 28, 1975, went to Dr. Weisman's office in Phoenix to serve a search warrant, and seized three invoices from Dr. Richardson (3324). He had heard Dr. Weisman was selling laetrile. He knew of no law stating laetrile to be unlawful (3334).

Ronald W. Watson, the next witness, was employed by the Narcotics Division of the Arizona Department of Public Safety, but his testimony was excluded (3350-3360).

James R. Hill, an employee of United Parcel Service, under subpoena produced several hundred receipts for merchandise shipped by one Carol Craven in San Diego (3364-3368). A number went to Mrs. C. M. Richardson (Dr. Richardson's mother) and were shipped by Dr. Richardson to various persons (3380-3386). He did not know the package contents (3387).

James L. Keyser, an employee of the Immigration and Naturalization Service at San Ysidro, Cal., on September 4, 1971, saw Juan Castillo-Garcia driving a car from Mexico (3390). In the trunk he found packages containing pills and powder (3398-3399).

Elaine Pricola, former wife of Myron Knoepfle, testified that early in 1973 she made visits to Dr. Richardson's office and met Bowman (3425-3429). Dr. Richardson prescribed water pills for her kidney infection (3430). She bought some laetrile from a man on the street (3430). Bowman mailed her some laetrile once or twice (3431-3432). She met Bradford in a Lodi restaurant. He then supplied Knoepfle with pills (3434), and later had to raise the price (3435). In 1974 at a party she again met Dr. Richardson (3443). Knoepfle then went to Mexico for a supply, and declared it at the border (3444-3446). On cross-examination she said she did not sell laetrile (3451), but when confronted with contradictory testimony, admitted that she did (3452-3453).

Thomas G. Barnes, a professor of history and law at the University of California, testified that in 1976 his mother, now deceased, was being treated by Dr. Richardson for metastatic carcinoma (3461). At this point objection was interposed to the Government's attempt to show by indirection the claimed ineffectiveness of laetrile, Bradford's counsel saying—and justifiably so:—"So far Mr. Hoffman has continually emphasized the death from cancer of people who were on laetrile at some point of time" (3465). There were placed in evidence checks from the mother of the witness to Dr. Richardson (3467-3468). Cyto vials were found among her effects (3469-3470). On cross-examination the witness had to admit that he had falsely represented in writing that he was his mother's "former attorney" despite the fact that he was never an

attorney at all (3478-3480). He admitted that she had gone through a full course f radiation therapy as well as chemotherapy (3484-3487, 3503). Nothing in Dr. Richardson's bills indicated that any items had been smuggled (3508).

Elaine Pricola, recalled, told of how on several visits to Dr. Richardson he diagnosed her as suffering from Meniere's disease, migraine, Bartholin cyst, chronic bacterial vaginitis and other ailments, prescribing Shaklee vitamins, niacin, fenagan and triple sulpha cream (3533-3534). She was taking a number of other drugs on her own, including amygdalin (3536-3537). There had been no mention of smuggling in either her or Dr. Richardson's former trials (3540-3543).

Elmo Quierolo, an employee of Mayfair Packing Company in the sales department at San Jose, testified that his firm engaged primarily in the packing of dried fruits (3550-3551). He identified invoices to Cyto Parma (3552) between 1971 and 1976 for the purchase of apricot kernels in 80-pound sacks (3554). His dealings were with George Del Rio (3555). They would send up from Mexico for the merchandise (3556). Bradford was handling the account for Cyto (3556-3557). Bradford stipulated that he was making purchases from Mayfair for Cyto and others (3559). There was nothing wrong in these transactions (3560-3562). The witness also sold to Salaman a few times (3565). He did not know Bowman and made no mention of Dr. Richardson (3569). In a single year Chicago Almond purchased eight times the quantity that Cyto bought (3570).

Virgil N. Rains, a Customs agent, testified as to an arithmetic analysis of various telephone toll calls in evidence, and calculated the number between the telephones

of various parties, including the defendants, Cyto, Heinsohn, Beverly Newkirk, Albatross Marine, Michaelis and Clinica de Tumorez (3584-3595). He did not know the reason for any of the calls (3601, 3618), nor did he have any means of ascertaining the identity of the caller or recipient (3608, 3619). He recalled that during the years 1973 and 1974 Dr. Richardson was undergoing three trials and that the Committee for Freedom of Choice, of which Bradford was president and Salaman vice-president was deeply involved in obtaining legal defense (3609).

Juana M. M. Vanover in 1972 began to work for one Zabanata and the C.R.E.M.A. cosmetic firm (3666-3667), which imported from a manufacturer in Germany named Sidus. The firm was also selling vitamins and amygdalin coming from Munich (3669). Dr. Contreras in Tijuana was a customer, but she could not recall others (3673). She helped smuggle merchandise across the border (3674), picking it up at the Tijuana airport (3676). On August 31, 1973, she was detained at the border with 500 vials of amygdalin, which she had not declared, and was placed under arrest (3677). She was charged with smuggling, pleaded guilty and was given probation (3678). She continued working in the sale of cosmetics (3680), and then began to work for the Del Rios (3681) with amygdalin along with Alfonso Martinez, receiving it and preparing it for shipment (3683-3684). She received from Alvarez, who was also known as Flaco, names of patients requesting merchandise (3689-3691). She sent it out under the name of Craven, using United Parcel Service, Greyhound or air freight (3693-3694). At times she would drive to San Jose and deliver items to the Del Rios (3696). After arrest of two of the runners—Gonzalez-Pacheco and Enrique—she discussed the matter with the Del Rios and Alvarez (3698). She kept a record of those who purchased and those who received merchandise (3701). She

began cooperating with the Government (3703-3705). She met Toni Moran, who had been a secretary in the employ of Cyto, and delivered merchandise to her (3706). She described her record of a number of orders from patients and others (3719-3725), including General Research Laboratories, one Mati Bowman, Salaman and Bradford (3736, 3752). When confronted with contradictions between her trial testimony and that given before the grand jury, she tried to explain that her grand jury account was untrue and evasive (3790). To illustrate, she had stated before the grand jury on April 10, 1975, that she did not distribute laetrile and knew of no one who was smuggling (3796-3797). She admitted crossing laetrile across the border about five times, but falsely told the grand jury that this had occurred only once (3806-3807, 3828).

Charles M. Silvera, a bank manager in Albany, Cal., under subpoena produced records of Dr. Richardson's check account, including authorization for Bowman to sign (3884-3888).

Carol Sullivan, an operations officer with Wells Fargo at El Cerrito, under subpoena produced records of an account under the name of Vitamin Purchases maintained by Dr. Richardson and Ralph Bowman between 1973 and 1975 (3932-3937).

Richard R. Raker, a Customs auditor, testified as to the amounts deposited in Dr. Richardson's Mechanics Bank account between 1973 and 1976, as well as deposits in the vitamine purchases account at the Wells Fargo Bank (3959-3967). The totals came to several million dollars, and one of the jurors was heard to exclaim "Wow!" as they went out (3982). Dr. Richardson objected strenuously to this line of proof as consisting of "an entirely irrelevant disclosure" and having nothing to

do with smuggling (3982-3983). It is obvious that evidence of this character was intended to prejudice the jury, but the objection was overruled and the proof was permitted to stand. The witness admitted that the figures were no indication of Dr. Richardson's employing some twenty-three persons, including three physicians (4000) and that nothing in the auditing implied smuggling (4001).

Michael D. Smith, an Internal Revenue agent, had examined the checks drawn on the Wells Fargo Bank, some drawn to cash and others to individuals (4008-4009), limiting his inspection to checks for more than $500 each (4014), but not analyzing 209 checks for lesser amounts (4015-4018). He did not know what merchandise was purchased with the checks (4018). The witness was permitted over objection to continue to give his findings and conclusions (4062-4072), a procedure clearly at variance with the principles laid down in *Lloyd* v. *United States*, 226 F.2d 9.

Richard R. Raker, recalled, continued with his conclusions as to various items and disbursements of a wholly immaterial character (4081-4089). He gave figures of supposed gross profits, but could say nothing about net profits, describing the books as amateurish, incomplete and not of a professional sort (4121-4142). As the witness continued with miscellaneous immaterial matters, the Court was constrained to remark to the prosecutor (4164), "I think that you're overtrying the patience of the jury and I think you're overtrying your case." His testimony necessitated cross-examination as to the figures and their significance (4174-4211), in the course of which the witness had to admit that other accountants might differ as to his conclusions very substantially (4201). With his testimony the Government rested its case (4219).

Despite a strong argument in support of the motion, the Court refused to strike portions of the testimony, including that of the witnesses Pinard, Geczy, Curiel and Chessey (4279-4299).

Defendant Richardson analyzed the evidence of the case and demonstrated the failure to prove a single instance of conspiracy of the defendants on trial to smuggle, or knowingly receiving smuggled goods (4388-4395). Defendant Bowman in his like application pointed out (4396) with regard to instances of smuggling in the evidence that none had been shown against him or Dr. Richarson in that regard (4403-4404).

Incidentally, the case is replete with the admission of hundreds of exhibits, a great number of them having remote or no relation to the issues. While the Court struck a number of them—but not including many that were incompetent and prejudicial—it is clear that the references to them in the course of the trial necessarily had an effect upon the jury (4279-4299).

The Court denied the motions of defendants Richardson and Bowman as to count one (conspiracy) and count two (likewise charging conspiracy), holding that there were triable issues (4434).

At this stage of the trial came defendant Bradford's opening and elaborate proof (4563-5745), the understanding being that all rulings made were to be deemed applicable to each defendant (4663, 4855). Included in the proof was the testimony of cancer sufferers who had recovered after using laetrile and the brochure of the Committee for Freedom of Choice, declaring (5112-5113):

> "It is apparent that there is a material called laetrile which has been widely tested and shows

> great promise as a cancer control agent . . . A large number of responsible doctors have enough faith in it to want to see large-scale testing leading to its eventual acceptance as a major weapon against cancer . . . The FDA and related agencies are using every means at their disposal to block even small-scale testing of laetrile and refuse to give cogent scientific reasons for their position."

Reference was made to numerous other publications to like effect (5244-5252).

An informative film respecting the treatment of cancer was projected in the absence of the jury (5274). The contents (statement of the narrator) are set forth in Volume XXXIV of the transcript. It was also brought out in the testimony of Michael L. Culbert, a magazine editor and publicity director, that he had received a communication from Dr. Carl M. Leventhal, Deputy Director of the Department of Health, Education and Welfare, wherein it was stated (5494):

> "The amygdalin distributed by Dr. Richardson is in the form of tablets and ampules which are labeled as containing a fifteen-per cent solution of Sidus amygdalin. Sidus is a German supplier of drugs."

While the proof presented by Bradford was primarily on his own behalf, it abounds in references to the other defendants and strongly supports the conclusion of their good faith and complete innocence of the charges. Salaman in effect adopted in his own defense the witnesses who had been called by Bradford (5786-5804).

The Government called several witnesses in rebuttal (6061-6062), but nothing in their testimony was of any special significance or indicative of fact pointing to the

guilt of the defendants. On a consideration of the entire case presented by the prosecution—with the scores of witneses (6535) and hundreds of exhibits—it is noteworthy that the vast majority of the individuals claimed to be engaged in smuggling and of the officials called to testify made no mention of the defendants. Where the evidence is insufficient to show smuggling or conspiracy, the conviction must be reversed. See *United States* v. *Bonanzi,* 94 F.2d 570.

There is no need to detail the contents of the respective summations of petitioners Richardson (6528-6597) and Bowman (6601-6635). Suffice it to say that they carefully reviewed the evidence and established that their conduct at no point was violative of law. In contrast, the lengthy summations of the prosecutor (6356-6519, 6842-6911) strained at trifles and went to great extremes to find foundations for imputing guilt to the petitioners.

Reasons for Granting the Writ.

I.

A study of the evidence, as detailed in the foregoing statement of the case, demonstrates the inadequacy of the proof to prove petitioners' guilt, or even to warrant submitting to the jury any issues thereon.

In rejecting this contention, the Court of Appeals cites *Glasser* v. *United States,* 315 U. S. 60, for the proposition that inferences were to be drawn in the light most favorable to the Government. However, in that decision the Supreme Court declared that a verdict may be sustained "if there is substantial evidence to support it." Such evidence is lacking herein.

II.

It was reversible error for the Trial Court to suggest that if petitioners testified, they could be cross-examined as to their tax returns, thus in effect depriving them of their right to take the stand.

Petitioners did not testify. It is reasonably arguable that their testimony might well have made a difference in the verdict. The reason for their failure to take the stand was the Trial Court's ruling that if they testified, they could be examined as to their income tax returns and the contents thereof. The Government was exceedingly anxious to introduce this means of cross-examination, including interrogation as to the contents of their tax returns, a procedure which might well have had the effect of transforming the trial into a dual inquiry, with emphasis upon matters in no way germane to the true issues. As the Court declared (5859):

> "I don't intend to allow the tax returns. I don't think this is a tax case or a tax fraud case. It gets us into collateral areas that are not germane to the smuggling. I would think, Mr. Hoffman that I disallowed it during the Government's case in chief. To allow it now, when the defendant has not taken the stand, I think would compound the problem. It may very well be one of the reasons that was significant for this defendant not to take the stand was to open the door to such inquiry."

The Court was quite correct in inferring that the reason for the unwillingness to testify was the likelihood that they would be confronted with the matter of the taxes and thereby gravely prejudiced. All of these circumstances lead to the question of whether the Court was in the right when it presumptively ruled that if a defendant testified, he would be open to cross-examination upon the entirely collateral tax matters. This constituted a serious error, for the law appears clear that a defendant testifying on his own behalf may not be cross-examined on such collateral subjects and thereby be in effect placed on trial for some other conceivable crime wholly unrelated to the subject prosecution.

As Booth, Circ. J., wrote in *Gideon* v. *United States*, 52 F.2d 427:

> "It is not permissible in the guise of testing the credibility of a defendant to question him on cross-examination about matters not touched upon in the examination in chief nor pertaining thereto, not tending to prove the charge upon which the defendant is being tried, but the sole tendency of which is to prejudice the defendant in the eyes of the jury."

In a case wherein there was an argument as to the admissibility of collateral matters, the Trial Court informed the defendant that if he took the stand, "he was laying himself open to that kind of cross-examination." Accordingly, the conviction was reversed in *United States* v. *Provoo*, 215 F.2d 531.

III.

It is clear from the character of the testimony that the entire prosecution was an unjustifiable attack upon the use of laetrile.

Despite the Government's concession that "laetrile is not a narcotic drug," that it is readily purchasable and that its distribution is not an unlawful act (prelim. Vol. VII, pp. 131, 333-334), it is impossible to peruse the

record without coming to the conclusion that the indictment and trial were animated by a basic aim at eliminating from use the substance, whether termed laetrile, amygdaline or B-17. Every transaction detailed in the voluminous evidence was obviously calculated to implant in the minds of the jurors that those accused—and numerous others—were trafficking in some deleterious, dangerous or poisonous substance against which the protection of the public was paramount. If we were concerned with a simple charge of smuggling, or conspiracy to smuggle, the evidence could well have been presented by a handful of witnesses in a matter of hours instead of the protracted proceedings consuming months and thousands of pages of testimony. Objections or motions in protest could scarcely have been presented in advance of knowledge of the extent of the evidence. Against such a background of this vendetta against laetrile and those having anything to do with it, it is easy to see that the jurors would be swayed to the belief that they would be performing a public service in going along with the Government's attitude.

The impropriety of such official posture is well demonstrated by the recent decision of Bohanon, U. S. D. J., in *Rutherford* v. *United States,* rendered on December 5, 1977, wherein the Secretary of Health, Education and Welfare and the Commissioner of the Food and Drug Administration were joined as defendants. The background of the action was the fact that on July 29, 1977, the Commissioner had declared laetrile as not being a safe and effective cancer drug, and was therefore illegal and subject to regulatory activity by the Food and Drug Administration. The plaintiffs challenged the decision, urging that the enforcement procedures against interstate transportation and use of the substance violated plaintiffs' constitutional rights. The Court upheld plaintiffs'

contentions and vacated the Commissioner's decision on laetrile. The opinion is an in depth study of laetrile, going back to medical journals reporting its use in the treatment of cancer as early as 1845 and giving the names of a number of eminent physicians and scientists who are proponents of its efficacy. In addition, the correctness of the determination by the Court is fortified by the citation of more than two dozen recent reported cases, including seven holdings of the Supreme Court of the United States. Attention is directed to Judge Bohanon's learned opinion, which has the effect of strongly supporting the conduct of those physicians who innocently and in good faith employ laetrile for whatever therapeutic effects it may have. As a necessary corollary of such a view, there is no justification for the elaborate efforts of the Government to inflict punishment upon those individuals.

On the appeal in *Rutherford* (582 F.2d 1234), the Court held that the Food and Drug Administration had erred in concluding that the distribution of laetrile was illegal in that it was not generally recognized to be safe and effective in the treatment of terminal cancer. Accordingly, the Court ruled that patients so circumstanced were entitled to procure intravenous injections. No such question had arisen in the cases cited by the Court of Appeals herein (*United States* v. *Luther,* 521 F.2d 408, and *United States* v. *Westover,* 511 F.2d 1154).

IV.

Various incidents and erroneous rulings operated cumulatively so as to deprive petitioners of a fair trial.

The attention of the Court is directed to the following matters and their bearing upon the outcome:

(a) A fair reading of the transcript is indicative of a constant effort on the part of the Government to suggest the impropriety of laetrile and to make the case turn on this contention, despite concession that it is not a narcotic drug (131).

(b) It was error to receive the statement of an alleged coconspirator under the facts of this case in order to impute smuggling to the defendants. *Krulewitch* v. *United States,* 336 U. S. 440.

(c) It was error to permit the Government to refuse to disclose the identity of an alleged tipster and to deny a mistrial motion in consequence (730, 810-811).

(d) It was error to receive in evidence or refer to a prejudicial newspaper article (803).

(e) The Court erred in permitting proof of a number of wholly immaterial transactions (817-830).

(f) The Court improperly dispensed with the mandatory requirement of an administrative hearing before any bar to laetrile importation.

(g) It was error to receive a hearsay tape in evidence (955).

(h) The Court erred in receiving the prejudicial testimony of the witness Edelstein despite his lack of personal knowledge of the involvement of any of the defendants (1169, 1193, 1199).

(i) It was error to admit in evidence the hearsay statement of an unindicted conspirator (1582).

(j) The testimony about "outrageous" prices (1869) charged by appellants for laetrile would inevitably affect the jury in its deliberations, for they would be bound to regard any one in that posture as an unscrupulous profiteer. Nor can the circumstance that the Court ordered the remark stricken and the jury to disregard it be effective, for, as Mr. Justice Jackson pointed out in *Krulewitch* v. *United States,* 336 U. S. 440, 453:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be an unmitigated fiction."

(k) The addition to Revenue Agent Tiner's notes of the admonition "Make sure there is a case on Doctor" is strongly indicative of discriminatory prosecution.

While any of the foregoing factors might be argued —although we do not agree—to constitute harmless error, when they are viewed in their entirety in the light of the frailties of the Government's proof and the extended deliberations of the jury, the conclusion is irresistible that they operated to deprive defendants of a fair trial.

As this Court held in *McCandless* v. *United States,* 298 U. S. 342, 347, a single error relating to "substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." In the instant case, with so many items, it may not reasonably be said that the errors were harmless.

V.

As indicated in Point IV, *supra,* the inconsistency of the Court of Appeals decision with the Tenth Circuit's

decision in *Rutherford* v. *United States*, 582 F.2d 1234, is strongly indicative of the desirability of further review.

VI.

Finally, this Court's grant of a writ of certiorari in *Rutherford* on January 22, 1979, suggests in all fairness that petitioners herein should be accorded like review.

Conclusion.

The case is one wherein petitioners have been unjustly convicted. The present application presents meritorious and certainly arguable questions on subjects likely to arise in other cases and of a character requiring authoritative disposition. The petition is filed in good faith and not for purposes of delay.

For the foregoing reasons, your petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit, to the end that this cause may be reviewed and determined by this Court; that the determination, order and judgment of the said Court of Appeals may be reversed and that petitioners be granted such other, further and different relief as may seem proper and just.

Dated: New York, N. Y.,
January 31, 1979.

JOHN A. RICHARDSON and
RALPH S. BOWMAN,
By JOSEPH BRILL,
Attorney for Petitioners,
122 East 42nd St.,
New York, N. Y. 10017

APPENDIX A.

Opinion of United States Court of Appeals for the Ninth Circuit.

IN THE UNITED STATES COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOHN ANTON RICHARDSON, RALPH S. BOWMAN, FRANK SALAMAN, ROBERT WILLIAM BRADFORD,

Defendants-Appellants.

Nos. 77-2203, 77-2204, 77-2262, 77-2288.

On Appeal from the United States District Court for the Southern District of California.

Before:

Merrill and Anderson, Circuit Judges, and Bartels,* District Judge.

MERRILL, Circuit Judge:

Laetrile is a substance (drug or vitamin) around which controversy for some time has raged as to whether it provides effective cure of or relief from cancer. The

*Honorable John R. Bartels, Senior United States District Judge of the Eastern District of New York, sitting by designation.

Food and Drug Administration has classified it as a "new drug" under 21 U.S.C. §321(p): a drug not generally recognized by experts to be safe and effective. Under 21 U.S.C. §355(b) as a result of this classification an application for approval of the new drug must be filed and the new drug cannot be transported in interstate commerce without such approval.[1] Approval so far has been

[1](*Page 1*) This classification was challenged by a group of cancer victims in *Rutherford* v. *United States*, 399 F.Supp. 1208 (W.D.Okla. 1975). There the district court enjoined the FDA from preventing the plaintiffs from obtaining Laetrile. The Tenth Circuit agreed that the FDA had failed to produce an administrative record to support its classification of Laetrile as a new drug and remanded for further proceedings to determine whether Laetrile was "grandfathered" under previous Food and Drug Acts. 542 F.2d 1137, 1142 (10th Cir. 1976). The FDA then held hearings, again finding that Laetrile was an unapproved new drug and was not exempt under the grandfather provisions. On review of that decision, in *Rutherford* v. *United States*, 438 F.Supp. 1287 (W.D.Okla. 1977), the district court found the agency's classification to be arbitrary, capricious and an abuse of discretion because the record clearly established that Laetrile was exempt under the 1962 grandfather clause of the FDA. 438 F.Supp. 1287, 1294-98. It enjoined the FDA from enforcing the new drug statutes in regard to Laetrile, specifically prohibiting the FDA and the Customs Service from interfering with the importation of Laetrile. 438 F.Supp. 1287, 1301.

On the second appeal the Tenth Circuit did not discuss the grandfather clause issue which formed the basis of its first opinion in the case, but instead adopted a new theory, stating:

> "We are considering only cancer patients who are terminally ill and only their intravenous use of Laetrile. • • • What meaning can 'effective' have in the absence of anything which may be used as a standard? Under this record Laetrile is as effective as anything else. What can 'effective' mean if the person, by all prevailing standards, and under the position the Commission takes, is going to die of cancer regardless of what may be done. Thus there has been no standard here advanced by the Commission against which to measure the safeness or effectiveness of the

withheld, which precludes importation of the drug and limits distribution of it in this country.

This case involves a conspiracy to smuggle the drug into the United States from Mexico and thereafter to distribute the smuggled merchandise. A twelve-count indictment was returned by a grand jury in the Southern District of California charging these four appellants and fifteen other codefendants with two conspiracies—one to smuggle merchandise and one to receive, buy, sell, transport and conceal the smuggled merchandise, both in violation of 18 U.S.C. §§ 371 and 545—and also charging various substantive offenses. The trial of these appellants was severed from that of their codefendants. All four were found guilty of the two conspiracy counts. Appellant Bradford also was found guilty of three substantive counts: two of smuggling and one of receiving, concealing and facilitating the transportation of smuggled merchandise.

The record establishes that in 1971 one McNaughton (a codefendant) was engaged in a chemical manufacturing business in Sausalito, California. He decided to move his plant to Tiajuana, Mexico, and there to manufacture Laetrile. The plant was established under the name of Cyto Pharma. One Contreras (a codefend-

(footnote continued)

> drug as to the plaintiffs. Clearly the terms have no meaning under these circumstances, and certainly not the abstract meaning sought to be applied by the Commission. • • •
>
> • • • •
>
> Therefore, we hold as a matter of law that the 'safety' and 'effectiveness' requirements of the statutes as now written have no application to terminally ill cancer patients who desire to take the drug intravenously."

582 F.2d 1234 (10th Cir. July 10, 1978). Thus the Tenth Circuit did not decide whether the district court was correct in holding that Laetrile could not be classified as a new drug.

ant) who maintained a cancer clinic in Mexico became co-owner of the enterprise. One Greczy (a coconspirator) who had acted as chemist for McNaughton in Sausalito, and two Del Rio brothers from Mexico (codefendants) were placed in charge of the plant. At the outset the plant produced only for Contreras' clinic. A surplus developed, however, and in the fall of 1971 it was decided by McNaughton, Contreras, Greczy and the Del Rios that the surplus should be brought into the United States for distribution. Since Customs officials regularly seized all declared Laetrile, this meant that the Laetrile would have to be smuggled in. One Thurston (coconspirator) was designated to act as distributor for McNaughton in the United States. Evidence as to the manner in which the conspiracy operated came from correspondence of Thurston seized under a state search warrant and from testimony of Greczy and numerous other codefendants, many of whom had actually brought Laetrile across the border and some of whom had engaged in knowing distribution.

Appellant Richardson is a medical doctor engaged in practice in Albany, California. Appellant Bowman is his office manager. Appellants Bradford and Salaman are active members of the Committee for Freedom of Choice in Cancer Therapy, which is engaged in seeking to remove the FDA classification of Laetrile or to secure its approval.

Government Misconduct

Here, as in the district court, appellants seek to secure judicial recognition of the legitimacy of the use of Laetril in the treatment of cancer. They contend that the FDA classification and its withholding of approval for Laetrile amounted to governmental misconduct. These questions, however, are not properly before us. Appellants were not convicted for possessing or using Laetrile but for conspiring to smuggle it, in violation of 18 U.S.C. §545. That section makes it a crime knowingly and wil-

fully, with intent to defraud the United States, to smuggle or clandestinely introduce into the United States any merchandise that should have been invoiced. This court has held that the term "invoiced" in §545 " 'carries the meaning attached to it in the customs law, viz., lawfully entered or declared'." *United States* v. *Boggus*, 411 F.2d 110, 112 (9th Cir.), *cert. denied*, 396 U. S. 919 (1969). The United States customs law as detailed by the Tariff Act of 1930, 19 U.S.C. §1202 *et seq.*, requires a person entering the United States from a foreign country to declare and present for inspection all merchandise imported or brought in from a foreign country. 19 U.S.C. §§ 1459, 1461, 1484, 1485.

Thus, one bringing goods into the country who fails to properly declare or present the goods as required by the Act violates 18 U.S.C. §545, whether importation of the merchandise was legal or illegal, *cf. United States* v. *Kushner*, 135 F.2d 668, 670 (2d Cir.), *cert. denied*, 320 U. S. 212 (1943) (duty free gold). Appellants do not contest the fact that one entering the country is obliged to declare any Laetrile he is bringing in. Thus the fact that the FDA may have improperly classified Laetrile as a new drug is irrelevant to a conviction for smuggling.[2]

Justification

Appellants contend that since Laetrile, when declared at the border, was regularly seized by Customs officials it could not be brought into the United States unless smuggled. Further they contend that it was needed in the United States to treat cancer patients. On these facts they invoke the defense of necessity or "choice of evils," traditionally a branch of the common-law doctrine of justification.

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[2](*Page 4*) Other convictions for smuggling Laetrile have recently been affirmed by this court. *United States* v. *Luther*, 521 F.2d 408, 409 (9th Cir. 1975); *United States* v. *Westover*, 511 F.2d 1154, 1156 (9th Cir.), *cert. denied*, 422 U.S. 1009 (1975).

This defense is said to be available when the actor is faced with a choice of two evils and finds himself in a position where he may "either do something which violates the literal terms of the criminal law and thus produce some harm or not do it and so produce a greater harm." LaFave and Scott, *Handbook on Criminal Law* (1972) §50, page 387. Thus it is asserted that society will benefit from the greater good that is accomplished by the violation of the literal language of the law. *United States* v. *Simpson,* 460 F.2d 515, 517-18 (9th Cir. 1972).

The defense of necessity, where it is recognized to exist, is hedged about with many conditions, at least one of which would prevent its application here: "[T]he assertion of the necessity defense requires that optional courses of action appear unavailable." *United States* v. *Mowat,* F. 2d , (9th Cir. July 18, 1978).

Here the obvious optional course of action was to take steps to render the "necessary" action legal—to pursue the course taken in *Rutherford* v. *United States, supra,* note 1, in seeking to have the FDA classification of Laetrile set aside or to have it approved as a new drug. If it was felt that classification as a new drug does not justify seizure of Laetrile declared at the border, the seizure could have been legally challenged. Also, as the government suggests, another alternative was the production of Laetrile in the United States.

We conclude that there is no merit in this contention of appellants.[3]

[3](*Page 5*) On this defense and on that of government misconduct, appellants sought to introduce much evidence bearing on the validity of Laetrile as a cancer drug and their contentions that the FDA classification was improper. The district court, after hearing, refused to allow the evidence to be introduced. Appellants assign this as error. Appellants were allowed to make an extensive offer of proof, however. For the reasons set forth in our opinion the defenses were not available and the offered proof was not relevant.

Sufficiency of the Evidence

Appellants Salaman, Richardson and Bowman contend that their conspiracy convictions were not supported by sufficient evidence. While the evidence clearly established that the Cyto Parma group had entered into a conspiracy to smuggle and that appellants had received smuggled Laetrile and then distributed it among themselves and to others, appellants urge there is insufficient evidence tying them to the conspiracy. Their basic defense to the charge was that they believed that the Laetrile had been lawfully imported.

Viewing the evidence and the inferences reasonably to be drawn from it in the light most favorable to the government, *Glasser* v. *United States,* 315 U. S. 60, 80 (1942), there is sufficient evidence to support the jury's verdict and the finding implicit in it that appellants knowingly participated in the conspiracy.[4]

[4](*Page 6*) We refer to a few among many items. Salaman both received and shipped packages of Laetrile with false identifying information. One courier testified to making deliveries to Salaman at the airport in San Jose where she would be driven to a secluded part of the airport and would be paid in cash. On one trip, when Salaman refused most of the shipment, the courier asked, "How do you expect me to pay the people that smuggled it?"

Bowman told an IRS agent that two checks on Richardson's account made out to cash were used to pay for the smuggling of Laetrile into the United States. Over 90 percent of the Laetrile used by Richardson was manufactured at Cyto Pharma. There was evidence that his account at Cyto Pharma was personally handled by one of the Del Rio brothers. There was evidence that he once told a co-conspirator that he obtained his Laetrile in the same way that appellant Bradford obtained him. Since, as appellants complain in discussing other assignments of error, it was not possible to get Laetrile across the Mexican border without smuggling it, it would seem most unlikely that Richardson and Bowman did not know that they were dealing with smuggled goods.

Appellant Bradford contends that his convictions on the substantive counts of smuggling and receiving were not supported by sufficient evidence. He presents two basic defenses; one, that the government did not establish that the Laetrile in question was unlawfully in the United States; and two, that the government did not establish that Bradford knew the Laetrile in question was smuggled.

While there was no direct evidence of illegal importation of the shipments in question or of Bradford's knowledge, there is ample circumstantial evidence to support the jury's verdict. Circumstantial evidence is sufficient to establish illegal importation. *See United States* v. *Scott,* 446 F.2d 509, 510 (9th Cir. 1971); *United States* v. *Gibbs,* 435 F.2d 621, 624 (9th Cir. 1970), *cert. denied,* 401 U. S. 994 (1971). It is also sufficient to establish knowledge of illegal importation. *United States* v. *Newton,* 442 F.2d 622, 623 (9th Cir.), *cert. denied,* 404 U. S. 844 (1971). Evidence respecting the counts in question is dealt with at length in the government's brief and we do not choose to burden this opinion with an extended discussion of it. It is enough to note that the connection between Bradford and Cyto Pharma was clearly established by the testimony of couriers and telephone records of Bradford. The Laetrile in question had been manufactured at Cyto Pharma. The shipments followed the methods of operation proved to be followed by Cyto Pharma couriers. On each occasion there was similar coincidence of arrest of courier, seizure of shipment and communication between Bradford and Cyto Pharma. On one occasion Bradford called Customs and requested to have the shipment released to him.

We conclude that the evidence supported the jury verdict on all convictions.

Consecutive Sentences as Double Jeopardy

Appellants were convicted of two separate conspiracies: one to smuggle; one to receive and distribute smuggled goods. Bradford and Salaman were sentenced to pay fines for each offense and thus received consecutive sentences. They contend that while the conspiracy involved two substantive offenses, it was but a single agreement and could not be made the basis for two separate counts without violating the double jeopardy clause. They rely on *Braverman* v. *United States,* 317 U. S. 49, 53 (1942). Before the district court they moved to dismiss the second count. The motion was denied.

The government's theory at trial was that separate and distinct conspiracy agreements had been entered into by McNaughton and his Cyto Pharma group with respect to smuggling and with respect to receiving and distributing, and that these appellants joined both ongoing conspiracies. The government notes that the objects, members and locales of the two conspiracies differed and justified a finding of two conspiracies. It points out that the evidence links some of the coconspirators to the smuggling operation while others are linked to the distribution operation. Under these facts, "two distiguishable conspiracies may be charged, prosecuted and punished when the jury so chooses to interpret the evidence." *United States* v. *Arteaga-Limones,* 529 F.2d 1183, 1194 (5th Cir.), *cert. denied,* 429 U. S. 920 (1976). There the court stated:

> "The objects of the two conspiracies were different (importation and distribution). The persons involved were different; for example, the evidence links Cantu only to the 'distribution' portion. Finally, the locales were different. Castillo's account alleged that the importation took place in the Del Rio area; the distribution *began* there, but the ultimate consumers of the marijuana were in New York."

United States v. *Arteaga-Limones, supra,* 529 F.2d at 1194.

Appellants point out that both conspiracy counts alleged the same overt acts and identical coconspirators. This does indeed suggest one agreement rather than two, but is not sufficient to establish that fact as matter of law. The question whether there was but one agreement remained one of fact for the jury, *United States* v. *Roselli,* 432 F.2d 879, 898 (9th Cir. 1970), *cert. denied,* 401 U. S. 924 (1971), and was resolved against appellants by the verdict.

Other Assignments of Error

Richardson and Bowman contend that it was error to rule that if they took the stand they could be cross-examined concerning their income tax returns. They assert that this ruling in effect prevented them from testifying. The ruling, however, was preliminary and tentative and did not amount to a denial of right to testify. *See, e. g., United States* v. *Fulton,* 549 F.2d 1325, 1327 (9th Cir. 1977); *United States* v. *Murray,* 492 F.2d 178, 197 (9th Cir. 1973), *cert. denied,* 419 U. S. 942 (1974).

Denial of Salaman's motion for severance was not rendered abuse of discretion by the subsequent admission of evidence against Bradford. No objection was made to the admission of evidence and the motion for severance was not preserved on appeal. *United States* v. *Gaines,* 563 F.2d 1352, 1355-56 (9th Cir. 1977).

Appellants Bradford and Salaman urge they were denied a fair trial by the failure of the trial court to grant them leave to take the depositions of certain Mexican nationals. We disagree. It is within the sound discretion of the trial court to grant or deny a motion to depose a proposed witness in a criminal trial. *See United States* v. *Nichols,* 534 F.2d 202, 204 (9th Cir. 1976). Federal Rule of Criminal Procedure 15(a) provides that a trial court may permit depositions when "it is in the interest of justice." It has been held that it would work an injustice to allow the deposition of fugitive codefendants. *See United States* v. *Kelly,* 349 F.2d 720, 769 (2d Cir. 1965), *cert. denied,* 384 U. S. 947 (1966); *United States* v. *Murray, supra,* 492 F.2d at 195. Three of the Mexican nationals were fugitive codefendants and one was an unindicted coconspirator whose location was unknown. Under these circumstances it was not an abuse of discretion to deny the motion to depose. *United States* v. *Murray, supra,* 492 F.2d at 195.

Bradford did not move to suppress the fruits of a search of his car and cannot now, on appeal, raise the issue of the legality of that search. *United States* v. *Wysong,* 528 F.2d 345, 348 (9th Cir. 1976).

It was not error to deny Salaman's motion for an order granting use immunity to persons he desired to call as witnesses. The court has no power to make such a grant. *United States* v. *Benveniste,* 564 F.2d 335, 339 n. 4 (9th Cir. 1977).

We find no merit whatsoever in Salaman's contention that in permitting him to represent himself the court denied him adequate representation. The court repeatedly and adequately warned him of the dangers of self-representation and he repeatedly persisted in asserting his right to represent himself. *See Faretta* v. *California,* 422 U. S. 806 (1975).

We find no merit in the contentions of Richardson and Bowman that they were deprived of fair trial by a cumulation of rulings and incidents during trial, or the contentions of Bradford and Salaman that there were numerous instances of prosecutorial misconduct. In neither instance do we find the cumulation to result in prejudice of any consequence.

There was no improper prosecutorial comment on Bradford's failure to testify. The comment was no more than an objection to Bradford's questioning of witnesses in such a leading fashion as to amount to the giving of unsworn testimony himself and was not of such a character that a jury would take it as a comment on the failure of Bradford to testify. *See United States* v. *Cornfield*, 563 F.2d 967, 971 (9th Cir. 1977), *cert. denied*, U. S. (1978). In fact, the prosecutor's objection was made at a time when it was not yet clear that Bradford would not testify.

Judgment affirmed.